by virtue of such possession. The court, in *Piper* v. *Richardson, supra,* held that by such possession an alien might acquire an indefeasible title against everyone, including the State; that the right of the State was barred by the statute of limitations and that it followed, as a result, that the alien acquired a valid title. The reasoning of the court finds support in cases involving adverse possession by persons not aliens. Thus in *Dean* v. *Goddard, supra,* the court held a valid title in fee was acquired by adverse possession for the statutory period. "The legal effect not only bars the remedy of the owner of the paper title, but divests his estate and vests it in the party holding adversely. * * * To say that the statutes * * * only bar the remedy, as some authorities do, is only to leave the fee in the owner of the paper title; * * * without a remedy. We think it better and more logical to hold that the occupier of premises by adverse possession acquires title." See also *Campbell* v. *Holt,* 115 U. S. 620, 623. It is worthy of note that in *Baker* v. *Oakwood* (1890), 123 N. Y. 16, 25 N. E. 312, not involving adverse possession by aliens, the court held the statute of limitations not only cut off the remedy, but also vested title. The court said: "The idea that title to property can survive the loss of every remedy * * * would seem to have but small support in logic or reason." In *Price* v. *Greer, supra,* the court stated that under a statute providing that aliens may take lands either by purchase, will or descent, a non-resident alien could establish *title* to the land by virtue of the statute of limitations. The court held that investiture of title by limitations is not by operation of law; that the statute of limitations raises a conclusive presumption in favor of the possessor of the land. In *Scottish American Mortgage Co.* v. *Butler* (Miss. 1911), 54 South. 666, under a statute providing that non-resident aliens shall not acquire or hold lands, except in certain instances and that all lands held contrary to its provisions shall be subject to escheat to the State, it was held that it was not the purpose of the legislature to render absolutely void titles acquired and held by non-resident aliens in violation of its terms, but they should be, as at common law, only voidable at the instance of the State. The court further held the owner of land was barred of right to a recovery by the adverse possession of an alien under claim of title for the statutory period; that title by adverse possession is not a title by operation of law. "It is title by purchase." See also *Bunckley* v. *Scottish American Mortgage Co.* (1911), 185 Fed. 783. G. E. B.

THE RESCISSION OF A PRE-CORPORATE CONTRACT ON THE GROUND OF PROMOTER'S FRAUD.—Cases arising out of promoters' frauds are numerous, and they present situations both varied and complex. They have been none too well classified by writers on corporation law. One recognized line of cleavage, however, separates those in which the parties base their claims upon some pre-corporate contract or relation from those in which the corporate relation itself is primarily and necessarily involved. See ALGER'S LAW OF PROMOTERS, § 123 *et seq.;* 1 MORAWETZ PRIV. CORP., Ed. 2, § 293. Within the first class such cases as *Brewster* v. *Hatch,* 122 N. Y. 349; *Short* v. *Stevenson,* 63 Pa.

St. 95; *Teachout* v. *Van Hoesen,* 76 Iowa 113; *Paddock* v. *Fletcher,* 42 Vt. 389; and *Emery* v. *Parrott,* 107 Mass. 95 are to be found. See also *Dole* v. *Wooldredge,* 135 Mass 140; *Cheney* v. *Gleason,* 125 Mass. 166. The substantive rights of parties to such transactions as these are fairly well settled, see ALGER'S LAW OF PROMOTERS, §§ 123-129, and in general their remedies and the classes of them are clearly defined. See *Vail* v. *Reynolds,* 118 N. Y. 297, 23 N. E. 301, and cases cited therein. The application of one of these remedies has twice raised before the New York courts a question which seems not to have been precisely before any other tribunal either English or American. It is that of the right of a subscriber to a partnership, joint adventure, or syndicate agreement made "prior to the formation of a corporation, the incorporation being an incident of the enterprise," (ALGER'S LAW OF PROMOTERS, § 123) to rescind the agreement, after incorporation has taken place, for the fraud of his promoter associates, and to recover money paid thereunder, upon the tender to the promoter or promoters of certificates of shares of the corporation's stock which he has received *pro rata* his subscription to the joint venture agreement, there being on laches.

The question was first discussed in *Getty* v. *Devlin* which was three times before the higher courts of New York, 54 N. Y. 403, 9 Hun 603, and 70 N. Y. 504, but the right of rescission was determined by the Commission of Appeals in the first case. See 70 N. Y. 504, per RAPALLO, J. In *Heckscher* v. *Edenborn,* 203 N. Y. 210, 96 N. E. 441 it was recently raised again, this time before the Court of Appeals.

In *Getty* v. *Devlin* the defendants, owning certain rights and interests in Ohio land for which they paid $30,000, secured subscriptions to an agreement of "association for development" to take over the land and interests at $125,000, which they represented to be their cost. They themselves, with some others subscribed to this agreement but paid nothing upon it, and they concealed their own interest in the land. Innocent parties subscribed and paid $65,000. Of this the promoters, after paying for the lands, etc., appropriated $30,000, and also received stock in the corporation later formed to take over and develop the land *pro rata* their subscriptions to the association agreement, along with the innocent and paying subscribers. In an action for equitable relief the defendants were compelled to account, but the Court declared that rescission, the plaintiff's offering to return to the fraudulent promoters their stock, was impossible.

In *Heckscher* v. *Edenborn,* the defendant was owner of more than one-half the capital stock of a New Jersey Iron Company, of par value capital stock $1,000,000. He and others promoted and organized a syndicate to raise $2,500,000 to acquire and develop iron properties, among them the New Jersey Iron Company. Defendant himself became in terms the largest subscriber to the agreement, but paid his subscription by transferring his Iron Company stock, concealing from plaintiff and other subscribers the fact of his interest in the Iron Company. The syndicate was organized, calls made upon subscriptions, the properties bought. Later the properties and cash assets were turned over to a corporation and certificates of corporate stock issued *pro rata* the syndicate subscriptions. Upon the basis of defendant's

concealment of his interest in the Iron Company, plaintiff and others tendered to him their corporate stock, and sought to recover the sums they had paid under the syndicate agreement. The court, viewing the action as one based on a prior rescission of the agreement, granted the recovery.

The cases differ in the plaintiffs' theories of them. They also differ in that in *Getty* v. *Devlin* there was actual fraud, while in *Heckscher* v. *Edenborn* the fraud was found to be constructive only. But they do not differ in the problem of rescission which they present. The basic contractual relation of the parties was about the same in each. In the former , EARL, J., considered that the parties were essentially partners and that partnership principles should apply; in the latter, right to relief was founded upon an express agency created by the syndicate agreement. But fiduciary relationship was the vital consideration in both cases. How then if at all, may the two decisions be reconciled? It appears that in *Getty* v. *Devlin* the plaintiffs and other stockholders, after discovering the fraud of the promoters, but before the action in that case was begun, had proceeded against the corporation and obtained the sale of the property acquired under the subscription agreement, to satisfy claims of theirs for money which they had advanced to the corporation for development purposes. It was this fact that furnished the ground for the court's denial of the right to rescind, under the view that since the sale of the property the return of the stock could no longer place the defendants *in statu quo*. In *Heckscher* v. *Edenborn*, the corporate property being still intact, the rescission was allowed. There is no doubt that HISCOCK, J., in his decision, relies upon *Getty* v. *Devlin* as an authority, and the later case must clearly stand as an affirmative and positive declaration of a rule of law laid down by indirection and implication in the older one.

The decision in *Getty* v. *Devlin* was no doubt equitable, and that in *Heckscher* v. *Edenborn* seems to be right, but there is a real difficulty in the cases. It is to be assumed that in both of these cases rescission is sought of the agreement of association, not of that of property or land purchase, or any other. With this in mind, a necessary and fundamental implication of the New York courts' doctrine seems to be that shares in a partnership or joint adventure, or in a corporation, are shares in the physical property of that partnership, joint adventure, or corporation. See LINDLEY, PARTNERSHIP, Ed. 7, p. 377, *Horner* v. *Meyers*, 4 Ohio Decisions 404; also COOK, CORPORATIONS, Ed. 6, § 12, pp. 54 et seq. and cases noted; *Commonwealth* v. *Hamilton Mfg. Co.*, 12 Allen 298; WILGUS, CORP. CAS. pp. 783, 785. See also WILGUS, CORP. CAS. pp. 781-785 n. Says EARL, J., "The real consideration for the money subscribed and paid was the real estate which was conveyed to the company at the request of the subscribers. The company took the title to the real estate, and then their interest in the company, and through it in the real estate, was represented by shares of stock. The plaintiffs did not place the four defendants in the position they were before the real estate was conveyed by returning their stock, because what the defendants parted with was the real estate, and that had passed beyond their control." And HISCOCK, J., "By what was thus said (in *Getty* v. *Devlin*), I think it was fairly implied that if the corporation had still been in possession of the real estate which

formed the subject of the fraudulent contract plaintiffs, by tendering the stock which represented their interest in the real estate to the defendant, would have offered a sufficient restoration." Yet the agreement in *Getty* v. *Devlin* contained these suggestive words, "said property to be put into an association for development upon such terms as these subscribers may elect after this subscription is complete," and in *Heckscher* v. *Edenborn* the agreement was for a syndicate to "purchase, acquire, use, develop and dispose of the lands and properties."

An examination of the texts and cases covering the law of the rescission of contracts convinces one that here is no place to apply a rule of thumb. There was none such applied in the leading case of *Hunt* v. *Silk,* 5 East 449. The doctrine of rescission *"in toto"* and of "parties put in *statu quo"* arose there from a situation the equities of which were simple and obvious. It is a doctrine equitable in its nature and should always be so applied. See *Babcock* v. *Case,* 61 Pa. St. 427, notwithstanding the implication of the term "voidable." See ADDISON, CONTRACT, Ed. 10, p. 117. The law is stated in *Masson* v. *Bovet,* 1 Denio 69, to be that "where a party has been led to enter into a contract by the fraud of the other party * * * the law only requires that the injured party restore *what he has received,* (strange to say HISCOCK, J., in *Heckscher* v. *Edenborn* uses the words, "on restoration of what they have received"), and, in so far as he can do, undo what has been done in the execution of the contract." See also ADDISON, CONTRACTS, *supra,* pp. 117, 118 and cases cited; and generally pp. 113-125; 2 PARSONS, CONTRACTS, Ed. 9, p. 679 and Note p. 680 with cases cited and discussed.

It is submitted as a possible view that one who subscribes to such agreements as were involved in the New York cases, contracts for, and gets, not a share of the physical property owned and developed by the "joint adventure," but *a share in the enterprise,* and that one who in a like case returns to the promoters of the enterprise certificates representing his share in the same has returned *what he has received.* See LINDLEY, PARTNERSHIP, *supra,* pp. 522 *et seq.* at pp. 524 *et seq.* The following cases, while not exactly in point, are suggestive as bearing upon this question. *Cohen* v. *Ellis,* 16 Abb. N. C. 320; *reversed* 4 N. Y. St. Rep. 721, 26 Wkly. Dig. 43; *New Sombrero Phosphate Co.* v. *Erlanger* [1877], 5 Ch. 73, 46 L. J. Ch. 425, 36 L. T. Rep. N. S. 222, 25 Wkly. Rep. 436; *affirmed* 3 App. Cas. 1218, 48 L. J. Ch. 733, 39 L. T. Rep. N. S. 269, 26 Wkly. Rep. 65, 6 Eng. Rul. Cas. 777; *Cortes* v. *Thannhauser,* 45 Fed. 730; *Morrison* v. *Earls,* 5 Ont. Rep. 434; *In re Lady Forrest Gold Mine* [1901], L. R. 1 Ch. Div 582, per WRIGHT, J., at p. 590.

W. W. M.

WHEN IS AN AGREEMENT "NOT TO BE PERFORMED WITHIN A YEAR."—The House of Lords has confirmed the earlier English holdings to the effect that a contract of employment for two years, subject to determination by six months' notice by either party during that period, is within the fourth section of the Statute of Frauds, and that no action can be brought upon such